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In The
Supreme Court of the United States

No. [redacted] 77

EXCEL PACKING COMPANY, INC.,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT OF THE PETITION

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MAY, 1954.

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The petitioner, Excel Packing Company, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above cause.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 210 F. 2d 596. The District Court did not write a formal opinion.

JURISDICTION

The judgment of the Court of Appeals was announced on the 15th day of February, 1954. The statutory provision believed to sustain the jurisdiction of this Court is Section 1254 of the Revision of the Judicial Code, the same being Title 28 of the United States Code. The Statute of the United States, the validity of which is involved, is Title 4 of the Defense Production Act of 1950 (50 U. S. C. A. App. Sec. 2101-2110) (64 Stat. 803-812) which statute attempts to provide pricing regulations and price and wage controls, penalties for violation thereof and provides an exclusive tribunal to determine the validity of regulations propounded under the said statute in the Emergency Court of Appeals. Jurisdiction is also vested under the provisions of Section 706(b) of the Defense Production Act of 1950 and also by Section 1345, Title 28, United States Code.

Also involved is Distribution Regulation #2 promulgated under the Defense Production Act (16 F. R. 3772) dated April 30, 1951, as amended (16 F. R. 4191) and dated May 4, 1951 which regulation attempts to make the grading and grade-marking of meat mandatory.

Ceiling Price Regulation #24 dated April 30, 1951 (16 F. R. 3721), is another one of the pertinent regulations to be considered in this cause and this regulation

attempts to price meat and meat products that have been graded pursuant to Distribution Regulation #2.

QUESTIONS PRESENTED

1. Whether Title 4 of the Defense Production Act, since it was predicated on the "War Powers of Congress" is invalid and unconstitutional because at the time of its enactment no state of general emergency existed nor was there any declaration of war?

2. Whether the denial to this defendant of an opportunity to raise the invalidity of Ceiling Price Regulation #24 by way of defense in an action such as presented here, particularly during peacetime, denies due process of law as guaranteed by the Fifth Amendment?

3. Whether the Defense Production Act of 1950 unconstitutionally delegates legislative power contrary to Article I, Section 1 of the Constitution of the United States?

4. Whether Ceiling Price Regulation #24, even if it had formal validity, was wholly ineffective since the bulk of it is predicated on Distribution Regulation #2 which was declared void by a previous ruling of the Federal District Court which ruling is now *res judicata* since this ruling was appealed to the U. S. Supreme Court and dismissed by its mandate of Oct. 20, 1952 (344 U. S. 851).

STATEMENT OF FACTS

The United States Government filed a criminal action against Excel Packing Company, Inc. (hereinafter called "Excel") charging it with a violation of the Defense Production Act of 1950 as amended and Distribution Regulation #2, promulgated thereunder, the said action being filed on September 25, 1951 (S. R. 5-8).* Excel filed a motion to dismiss the criminal charge which motion was sustained by the District Court and appealed directly to the U. S. Supreme Court by the government (S. R. 9-10). On June 4, 1952 the United States Government filed this present action, a treble damage suit, against Excel for alleged violations of the Defense Production Act, more specifically, Sec. 409(c) of the said Act, as amended (50 U. S. C. App. 2109[c]). Excel, on June 26, 1952, filed a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 13). The motion was held in abeyance until such time as the Supreme Court of the United States issued its decision in the criminal action. On October 20, 1952, the Supreme Court issued its mandate (S. R. 11) dismissing the government's appeal in the criminal case (344 U. S. 851, 73 S. Ct. 89, 90, 97 L. ed. 661).

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*The Transcript of Record is referred to herein as "R". The Supplemental Transcript as "S.R."

Since the United States Government moved to dismiss the appeal in the criminal action in the Supreme Court of the United States, they thereby tacitly admitted the finding of the District Court that Distribution Regulation #2 was invalid and void, and after the Supreme Court issued its mandate, the motion in the civil action was set down for hearing before the same district judge that had heard the criminal case. He thereupon sustained the motion to dismiss (R. 19). Thereupon, the United States Government took an appeal to the Court of Appeals for the Tenth Circuit which reversed the decision of the Federal District Court on February 15, 1954.

The complaint, in the instant action, as filed by the government attempts to recover damages for alleged violations of Ceiling Price Regulation #24, issued under Title 4 of the Defense Production Act of 1950. The complaint alleges that the said regulation established ceiling prices for the sales of beef and beef products except the sales at retail. It is further alleged that between the dates of June 4, 1951 and September 29, 1951 the defendant sold and delivered beef carcasses in wholesale cuts at prices in excess of the applicable maximum price under CPR 24 and they prayed for judgment in an amount three times the alleged overcharges of $71,348.34 (R. 2-11).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The decision involves important questions of Federal Law pertaining to the construction of the United States Constitution and Statutes which questions have not been, but should be settled by this Court.

For practical purposes, the Defense Production Act of 1950 is a reenactment of the Emergency Price Control Act of 1942. The 1942 Act was a valid exercise of the "war powers" of Congress. It is admitted that Congress in war time and as a war emergency does have constitutional authority to prescribe commodity prices and that in determining the effect of an Act of Congress, it is appropriate to consider the purposes of the Act and the circumstances attending its enactment and application as a war time emergency measure. In the instant case, we are met squarely with the question of whether the Defense Production Act of 1950 was a valid exercise of the war power of Congress when it attempted to establish a controlled economy in the absence of the declaration of a grave national emergency or war.

In the declaration of policy of the Defense Production Act (50 U. S. C. A. App. Sec. 2062), there is a complete failure to make any reference to the existence of a state of war or general emergency. In the 1942 Emergency Price Control Act, the declaration of policy is riddled with references to war and national emergency and in F. C. A. Appx. Sec. 901(a) the following is found:

"It is hereby declared to be in the interests of the national defense and security and necessary to the *effective prosecution of the present war*, and the purposes of this Act * * * " (emphasis supplied).

There has been no declaration of war or a state of national emergency on which the exercise of "war powers" attempted to be used in the passage of the Defense Production Act of 1950 could be grounded. Congress attempted to control the economy by passing the Defense Production Act and a careful analysis of the facts in the instant case leads one to the conclusion that Congress, in so doing at a time when no war was in existence, in 1950, overstepped its powers and went into the realm expressly prohibited and limited by the Constitution of the United States.

Article 1, Section 8 of the United States Constitution gives to Congress the power "to declare war" and "to make all laws which shall be necessary and proper for carrying into execution" that power.

As stated in the case of *Henderson* v. *Kimmel*, 47 F. Supp. 635, "the war powers are broad and comprehensive grants; they are almost limitless." It is the belief of this petitioner that such powers were not properly used in peace time. In the *Henderson* case, *supra*, it was settled that the Emergency Price Control Act was a statute born of the exigencies of war. Such an all-sweeping act cannot be passed legally under the exercise of "war powers" in peace time. War power is one given to meet a na-

tional emergency and permits the combined efforts of the people in the nation in an attempt to preserve that nation but it does not remove the constitutional limitations which safeguard our essential liberties. In the case at bar, there has been no Supreme Court decision construing the United States Constitution on this point and the attempted exercise of "war powers" is of vital importance as a matter of public policy sufficient to call for this Court's exercise of a power of supervision. The constitutional question presented in the light of any existent facts at the time of the passage of the Defense Production Act in 1950 was whether the powers used embraced that particular exercise of it in response to the conditions existing at that time. The "war powers" of Congress do not embrace the exercise of it in peace time and in the absence of any declared war and in the absence of any statement of general emergency. An attempt to exercise it in the passage of this Act designed to control economy is therefore unconstitutional.

Mr. Justice Jackson in the case of *Woods* v. *Miller*, 333 U. S. 138, 68 S. Ct. 421, 92 L. ed. 596, at page 145 of the official report stated the following:

> "Particularly when the war power is invoked to do things to the liberties of people, or their property or economy that only indirectly affects the conduct of the war, and do not relate to the management of the war itself, the Constitutional basis should be scrutinized with care."

The existence of a war emergency must be the basis for the exercise of an implied war power which tends to deny the rights of an individual or a state and the courts are not concluded by the mere declaration of Congress that such an emergency actually exists, or shall be presumed to exist or continue for some indefinite period in the future. (*Legal Tender Cases*, 12 Wall. 457, 540, 20 L. ed. 287, 308.) In this case Congress did not even declare any emergency as being in existence. How then, can Congress exercise "war powers" within the constitutional limits?

In *Porter* v. *Shibe*, 158 F. 2d 68, at page 72, the Court of Appeals quoted from the Supreme Court case of *United States* v. *Macintosh*, 283 U. S. 605, 51 S. Ct. 570, 75 L. ed. 1302, in which the immortal words of John Quincy Adams in discussing "war powers" were as follows:

> "This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life. To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied * * *; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy * * *. Property of alien enemies, heretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without the process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; * * * *and other drastic*

powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war" (emphasis supplied).

John Quincy Adams recognized that these drastic war powers were inadmissible of use in peacetime and could be exercised only to meet the emergency of war. The Supreme Court of the United States has recognized such a principle in the *Macintosh* case, *supra*. We are now confronted squarely with the important question of whether in the passage of the Defense Production Act of 1950, Congress attempted to use "war powers" in absence of war and whether such an act is constitutional?

In the case of *Schecter* v. *United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570, the Supreme Court declared the National Industrial Recovery Act to be unconstitutional. In that case at page 528 of the Official Report, the Court said:

> "Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limit because they believe that more or different power is necessary."

The decision of the lower court has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

I

The law and regulations under which Excel was charged in the present suit calls into effect the penal provision of treble damages. As such, the law is in the same category as a criminal statute and should be strictly construed.

United States v. *Yaffee*, 113 F. Supp. 382; *United States* v. *Walton Motors*, 114 F. Supp. 83. A denial to this petitioner of the right to raise the ineffectiveness of Ceiling Price Regulation #24 by way of defense in an action such as is presented here, particularly during time of peace, denies due process of law as guaranteed by the Fifth Amendment. Long ago, the United States Supreme Court recognized that when a citizen was to be punished for violating an administrative regulation, the court trying him for that violation should determine whether the regulation was valid or invalid. (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. ed. 446; *Monongahela Bridge Company* v. *U. S.*, 216 U. S. 177, 30 S. Ct. 356, 54 L. ed. 435.) The Defense Production Act of 1950 attempts to limit such a power to the Emergency Court of Appeals to determine the validity of any order or regulation promulgated under Title 4 of the Act. Such an attempt has never been given judicial approbation except during time of war which admittedly was not in existence at the time of the passage of this Act.

A prohibition in the Congressional Law against the consideration of a regulation is analogous in its impact to a conclusive presumption against the defendant. In the case of *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. ed. 1519, the Court found that whenever a presumption is set up, there must be a rational relation or connection between the fact proved and the ultimate fact presumed and that the presumption set up *must not preclude one from the right to present his defense to the main facts so presumed.* In the instant case, the law should not preclude this defendant from presenting all his available defenses at or before the time of trial. Congress has attempted to pass the Defense Production Act of 1950 giving certain courts the judicial power to decide and pronounce a judgment and at the same time have attempted to take certain inherent powers away from the judiciary so as to render their decisions practically inoperative. Congress has attempted to give the Federal District Courts jurisdiction to have a trial on the merits of the case but have attempted to preclude the defendant from raising the question of the ineffectiveness of the regulation. The Supreme Court of the United States, in speaking of judicial power, in the case of *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 11, 69 L. ed. 162, at page 66 of the official report said:

> " * * * The attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative * * *."

In the instant case Congress has attempted to do exactly what the above case says cannot be done and expressly prohibits. Again, we must make a distinction between what may be applicable in time of war as distinguished from that applicable in time of peace. Congress has no powers other than those given by the Constitution and these powers are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limit merely because they believe that more or different power might be necessary. In the instant case, Congress cannot, in peace time, preclude one from the right to present all of his defenses at the trial of the case. In wartime, for the common good and for the preservation of the nation, the constitutional limits must be elasticized to meet war time conditions. This is certainly not true in time of peace.

II

In addition to the foregoing, the petitioner makes the point that this case involves the effectiveness of two regulations, namely, Distribution Regulation #2 and Ceiling Price Regulation #24 (R. 35).

Distribution Regulation #2 attempts to make mandatory the grading of beef and beef products. This was the regulation that was declared void in the criminal

action previously referred to. That action was dismissed by Mandate of the United States Supreme Court. The finding of the Federal District Court then becomes *res adjudicata* concerning Distribution Regulation #2 and it is completely void. In fact, it is doubtful that the government would now contend that Distribution Regulation #2 is valid. Differentiated from Distribution Regulation #2 is Ceiling Price Regulation #24 which establishes ceiling prices for the grades of meat. Its primary function is pricing. It incorporates for its pricing purposes Distribution Regulation #2 which requires grading but which is a void regulation. How then, can Ceiling Price Regulation #24 be an effective regulation on which to base the complaint now before this Court? When reduced to its simplest form, it is plain to see that Ceiling Price Regulation #24 has within it the grading requirements of DR #2, a void regulation. The grading requirements are essential features of the pricing plan in CPR #24. Without it, CPR #24 has no vitality.

This case is analogous to the case of *Schechter* v. *U. S., supra*, where the Supreme Court struck from the National Industrial Recovery Act the provisions pertaining to wages and the hours of labor. In addition, the Court declared that entire act to be unconstitutional. In the instant case, the same reasoning is most appropriate when applied to the regulations involved. The Court has already struck Distribution Regulation #2 as being void.

This decision is affirmed by the mandate of the United States Supreme Court dismissing the criminal action. We must then strike from the provisions of Ceiling Price Regulation #24 all references to the void Distribution Regulation #2. When that is done, there is no further legal grounds on which the complaint in the instant case can be sustained. The infected portion of Ceiling Price Regulation #24, namely DR #2, is the very bone and sinew of the regulation. There is no possibility of the severance of the infected portion of the regulation and the saving of the remainder since CPR #24 collapses completely when DR #2 is withdrawn from its terms.

As Mr. Justice Cardozo said at page 554 of the official report of the *Schechter* case, *supra*:

> " * * * To take from this code the provision as to wages and the hours of labor is to destroy it altogether. If a trade or an industry is so predominantly local as to be exempt from regulation by the Congress in respect to matters such as these, there can be no 'code' for it at all. This is clear from the provisions of Section 7(a) of the Act with its explicit disclosure of the statutory scheme. *Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder. A code collapses utterly with bone and sinew gone*" (emphasis supplied).

Practical reasoning requires that Ceiling Price Regulation #24 must have severed from it the infected Distribution Regulation #2. Without Distribution Regulation

#2 there is no hope of saving the rest of Ceiling Price Regulation #24. The regulation collapses completely with its bone and sinew gone. When Ceiling Price Regulation #24 has collapsed, there is no basis upon which the present complaint could possibly be sustained.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 77

EXCEL PACKING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court for the District of Kansas wrote no opinion in support of its order of dismissal (R. 19). The opinion of the Court of Appeals for the Tenth Circuit (R. 21-25) is reported at 210 F. 2d 596.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1954 (R. 25). The petition for a writ of certiorari was filed on May 15,

1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

1. Whether the price and wage stabilization provisions (Title IV) of the Defense Production Act of 1950 were a valid exercise of the powers granted Congress by the Constitution.

2. Whether the dismissal of an information against petitioner in a prior criminal case is *res judicata* as to the present civil cause of action by the United States.

STATUTES INVOLVED

The relevant portions of the Defense Production Act of 1950, 64 Stat. 798, as amended, 65 Stat. 131, 66 Stat. 296; 50 U. S. C. App. 2061, *et seq.*, are quoted in the Argument, *infra,* pp. 4-5.

STATEMENT

This civil action was instituted by the United States on June 4, 1952, to recover from Excel Packing Company, Inc., petitioner here and defendant below, treble damages in accordance with the provisions of section 409(c) of the Defense Production Act (50 U. S. C. App. 2109(c)).[1] The complaint

[1] An entirely independent criminal action had earlier been instituted in the same court by the United States against Excel (S.R. 5), alleging the violation of Distribution Regulation 2 (D.R. 2) (16 F.R. 3772, 32A C.F.R. (1951 Rev.) 1437), as amended. That Regulation was concerned with meat grading, and not with price control, and was based on Title I (Priorities and Allocations) of the Defense Production Act, rather than Title IV (Price and Wage Stabilization). See 16 F.R. 3773; petitioner's recognition of this distinction at R. 15; and the

(R. 2-11) alleged that Excel had sold beef carcasses and wholesale cuts of beef at prices in excess of the maximum prices established by Ceiling Price Regulation 24 (C. P. R. 24) (16 F. R. 3721, as amended, 32A C. F. R. (1951 Rev.) 509); that the total of such overceiling sales was at least $71,348.34; and that under section 409(c) of the Act petitioner was liable to the United States for up to three times that total amount. Judgment was prayed in the sum of $214,045.02.

Excel, without filing an answer, moved to dismiss the complaint on the ground that it failed "to state a claim upon which relief could be granted" (R. 13), and the District Court granted the motion (R. 19). The court made no findings of fact or conclusions of law, and it did not file an opinion.

On appeal by the United States, the Court of Appeals for the Tenth Circuit reversed and remanded the cause for a hearing on the merits (R. 25-26). The Court of Appeals held (R. 21-25) that the Defense Production Act was constitutional, that its enactment was a valid exercise of Congress' war powers, and that there was no unconstitutional delegation of legislative authority to the Director of Price Stabilization. The court also held that C. P. R. 24 was not necessarily invalid because it contains a reference to D. R. 2 which had been held

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District Court's conclusions of law (S.R. 9). The District Court granted Excel's motion to dismiss the information on the ground that D.R. 2 was invalid (S.R. 9-10). An appeal to this Court by the United States was dismissed on motion of the Solicitor General (S.R. 11-12).

invalid in the criminal proceeding (see fn. 1, *supra*, p. 2), and that, in any event, the District Court had no jurisdiction to consider the validity of a price regulation since exclusive jurisdiction to consider such questions was vested by the Defense Production Act in the Emergency Court of Appeals.

ARGUMENT

Petitioner asks this Court to hear a three-pronged attack on the constitutionality of Title IV of the Defense Production Act. It does so in the face of many decisions by this and other courts which leave no doubt that the questions raised by petitioner have long since been finally and authoritatively answered contrary to petitioner's contentions, and in the face of the fact that Title IV, and all authority conferred thereunder, expired on April 30, 1953.[2]

1. Petitioner argues, for one thing, that the Defense Production Act is unconstitutional, as a denial of due process, because it grants exclusive jurisdiction to hear attacks on the validity of a price ceiling regulation to the Supreme Court and to the Emergency Court of Appeals,[3] and, there-

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[2] Defense Production Act, § 717(a), 50 U.S.C. App. 2166(a). The Government's right to proceed with actions filed before the termination date is preserved by section 706(b) of the Act (50 U.S.C. App. 2156(b)).

[3] Section 408 (50 U.S.C. App. 2108) provides in part:

* * * * *

(c) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any such regu-

fore, denies petitioner the right to raise in the District Court the defense of invalidity to this action for damages. Petitioner never sought to test the validity of the price regulation by recourse to the administrative procedure and to the court review provided for by the Defense Production Act. Sections 407 and 408 of the Act (50 U. S. C. App. 2107, 2108), in language almost exactly like that employed in sections 203 and 204 of the Emergency Price Control Act of 1942 (50 U. S. C. App. 923, 924), permit the filing of a protest against a price regulation with the Director of Price Stabilization and provide for the exclusive review of the Director's determination by the Emergency Court of Appeals and by this Court. Such a protest may be filed with the Director within six months after "the effective date of any regulation" or after "new grounds [for protest] arise" (§ 407(a)).[4]

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lation or order issued under this title * * *. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title * * * authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

[4] Although petitioner failed to file a timely protest as required by section 407, it is not necessarily remediless with respect to challenging the validity of C.P.R. 24. Section 408 (d) allows the District Court, on motion by defendant within five days after judgment, to authorize the filing of a complaint in the Emergency Court of Appeals objecting to the validity of a price control regulation. A stay of the enforcement proceeding is authorized while the Emergency Court of Appeals case is pending (§ 408(d)(2)).

This entire procedure has received the approval of this Court in cases arising under the Price Control Act of 1942. *Lockerty* v. *Phillips,* 319 U. S. 182; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503; cf. *Lichter* v. *United States,* 334 U. S. 742. That such "judicial approbation" was given to a statute enacted "during a time of war" (Pet. 11) is of no significance; the Court did not ground its approval of the exclusive jurisdiction of the Emergency Court of Appeals on Congress' war powers but on the authority conferred by Article III, section 1 of the Constitution. *Lockerty* v. *Phillips, supra.*

Moreover, there can be no denial of due process where, as here, petitioner has failed to test the validity of the price regulation in the manner prescribed by statute. In *Yakus* v. *United States,* 321 U. S. 414, this Court said of the protest and review procedure of the Emergency Price Control Act (pp. 433-435):

> * * * The organization of such an exclusive procedure especially adapted to the exigencies and requirements of a nation-wide scheme of price regulation is, as we have seen, within the constitutional power of Congress to create inferior federal courts and prescribe their jurisdiction. * * * Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. * * *
>
> Petitioners assert that they have been de-

nied that opportunity * * *. A sufficient answer to all these contentions is that petitioners have failed to seek the administrative remedy and the statutory review which were open to them and that they have not shown that had they done so any of the consequences which they apprehend would have ensued to any extent whatever, or if they should, that the statute withholds judicial remedies adequate to protect petitioners' rights.

* * * [W]e have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. * * * Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed. * * * But upon a full examination of the provisions of the statute it is evident that the authorized procedure is not incapable of affording the protection to petitioners' rights required by due process.

2. Petitioner also asserts that the Defense Production Act delegates to others the legislative

power of Congress in contravention of Article I, Section I of the Constitution (Pet. 3). But the petition admits that "For practical purposes, the Defense Production Act of 1950 is a reenactment of the Emergency Price Control Act of 1942." (Pet. 6), and it is sufficient to point out that the Court, when faced with the same contention under the Emergency Price Control Act, held that there was no invalid delegation of the legislative power. *Yakus* v. *United States,* 321 U. S. 414, 423; *Bowles* v. *Willingham,* 321 U. S. 503.

3. Petitioner likewise claims that Title IV of the Defense Production Act is unconstitutional because its enactment was an exercise of Congress' war powers, but there was no declaration of war and no state of general emergency at the time of passage. By posing the question in this way, petitioner ignores the existence of events which make manifest the propriety of Congress' exercise of its defense and war powers, and limits those powers in a way which the courts have not seen fit to follow.

The Defense Production Act was enacted on September 8, 1950. At that time the United States was still technically at war with both Germany and Japan.[5] Even more important was the fact that the United States had committed its armed forces

[5] The war with Germany was not terminated until the fall of 1951 (see H.J. Res. 289, 82nd Cong., approved October 19, 1951 (P.L. 181, 65 Stat. 451)), and the treaty of peace with Japan was ratified by the Senate on March 20, 1952 (98 Cong. Rec. 2551, 2595), and signed by the President on April 15, 1952. See Justice Jackson's concurring opinion in *Woods* v. *Miller Co.*, 333 U.S. 138, 147.

to the defense of Korea in June of 1950,[6] and a national emergency was proclaimed by President Truman on December 16, 1950 (Presidential Proclamation 2914, 64 Stat. A454), three days before the first ceiling price regulation was promulgated.[7]

In these circumstances, there is no merit to the claim that the Act fails of support in the war power and the power to further the national defense. "From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law." *United States* v. *Macintosh,* 283 U. S. 605, 622. Congress also has broad authority to act in the interest of national defense, even when the country is technically at peace. The Constitution does not require a declaration of war or national emergency before Congress can act to protect the common security—though, in fact, both of these were in existence when the first price regulation was promulgated. And it is of no significance, as petitioner contends (Pet. 6-7), that Congress did not use the word "war" in the Defense Production Act's declaration of policy (§ 2, 50 U. S. C. App. 2062); it used language equally forceful when, in

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[6] President Truman ordered United States air and sea forces to support South Korea. N.Y. Times, June 28, 1950. The United Nations Security Council had that same day approved a motion by the United States urging member nations to help repel by force, if necessary, the invasion of South Korea.

[7] C.P.R. 1—New Passenger Automobiles, 15 F.R. 9061, 32A C.F.R. (1950 Supp.) 51, was issued on December 18, 1950.

an obvious reference to the Korean action, it spoke of opposing "acts of aggression" and of supporting "collective action through the United Nations and through regional arrangements for mutual defense in conformity with the Charter of the United Nations." In any event, "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Miller Co.*, 333 U. S. 138, 144.

Petitioner's argument consists of no more than an assertion that the war powers are broad in scope and therefore must be carefully exercised. It does not, however, explain why the continuing state of war with Germany and Japan, the existence of the crisis in Korea, and the effects of both on the Nation were not sufficient causes for bringing those powers, as well as the other powers pertaining to the national defense, into play. To conclude, as does the petitioner (Pet. 6), that a declaration of war or emergency is the only key which opens the door to the use of these powers is to blink both at history and at the particular facts in existence when the Defense Production Act was passed. The country can defend itself against external peril menacing its security without a formal declaration of war or a breach of formal peacetime status.

4. Finally, petitioner contends that the dismissal of the information in the prior criminal proceeding (see fn. 1, *supra*, p. 2) bars the present civil suit. The argument is that the earlier decision invalidated Distribution Regulation 2, and

Ceiling Price Regulation 24, involved here, must likewise fall because it refers to and rests on D. R. 2. The Court of Appeals gave the two decisive answers to this point (R. 24-25). First, the issue is one of the validity of C. P. R. 24 and should therefore have been raised before the Emergency Court of Appeals; the District Court had no jurisdiction to pass on the contention. Second, C. P. R. 24 was an independent regulation which could and did exist apart from D. R. 2; it merely referred to D. R. 2 for the short-hand purposes of definition and identification. Moreover, the issue does not have general importance; it mainly concerns this particular petitioner and a particular price regulation no longer effective.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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